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In the Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 775 & 945

JAMES R. GREEN, doing business as JIM GREEN'S TRUCKING COMPANY,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

Brief for Respondent in Opposition

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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

Brief for Respondent in Opposition

OPINIONS BELOW

On July 28, 1965, without opinion, the Supreme Court of California denied petitioner's petition for writ of review of the California Public Utilities Commission's decision entered October 6, 1964, Decision No. 67998, reported at 63 Cal. P.U.C. 425.

JURISDICTION

The jurisdictional requirements are adequately set forth in the petition.

QUESTIONS PRESENTED

The Public Utilities Commission of the State of California (Commission) respectfully submits that, more ap-

propriately stated than in the petition herein, the questions presented are:

1. Is petitioner's Fifth Amendment privilege against self-incrimination controverted by the order here under review, requiring petitioner to review his records to determine whether he has charged the applicable lawful minimum rate and to institute proceedings to collect such rate if his records reveal he has not done so in a specified period in the past and to report the results to the Commission?
2. Does the Commission imposed restriction of petitioner's permits, which requires he pay minimum rates to all carriers he may hire in the future to transport the property of his only shipper (Lewis Food Company), who receives the benefit of petitioner's gratuitous services, violate petitioner's Fourteenth Amendment guarantees of due process and equal protection?
3. Under 28 U.S. Code Section 1651(a) does this Court have jurisdiction to issue a common law writ of certiorari to the California Public Utilities Commission directing it to certify to the Court that portion of the record of this case not certified to the California Supreme Court by said Commission as a result of the state court denying petitioner a Writ of Review?

STATUTES INVOLVED

Pertinent provisions of the Public Utilities Code of the State of California (Sections 3664, 3666, 3667, 3668, 3774, and 3800) are set out in full in the Petition herein (pp. 4, 5, 6, of Appendix to Petition). Other pertinent provisions of the Public Utilities Code relevant to the instant case,

which have not been cited by petitioner and reproduced in his Appendix to his Petition, are §§ 1732, 3801, 3572, and 3662, and appear in full in Respondent's Appendix at page 1, et seq.

STATEMENT

While the facts of this case are set forth fully in the Commission's decision, appearing in petitioner's Appendix,[1] a brief explanation appears in order to clarify omissions and distortions presented by petitioner's statement. Shorn of all surplusage, the facts which have never been in dispute between the parties are simple. Petitioner is a permitted carrier coming under the jurisdiction of the Commission whose permits were issued to him at a time when his employer (Certified Transport) and his wife were parties in a proceeding before the Commission which terminated in revocation of the employer's permits for allowing its only shipper, Lewis Food Co., to obtain transportation of its property for less than the minimum rates in violation of Section 3667 of the Public Utilities Code.[2] During the pendency of that prior proceeding, petitioner requested his newly issued permits be suspended.[3] Six days after the California Supreme Court upheld the Commission's revocation of his employer's permits,[4] petitioner activated his permits, ceased his employee relationship and commenced serving the same shipper in the same manner as had his former employer, using the same method (subhaulers exclusively) and the same physical plant.[5] His wife, as his employee, took over the duties he had performed for his former employer.

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1. Appendix B, page 8.
2. Page 4, Pet. App.
3. Page 10, Pet. App.
4. Page 11, Pet. App.
5. Page 11, Pet. App.

From the time he commenced operating as a permit carrier until the Commission's investigation which began this proceeding, he operated as a sole proprietor, doing business as the Jim Green Trucking Company, serving only one shipper, Lewis Food Company, through the method of hiring subhaulers who did the actual transporting of the shipper's property at a negotiated rate less than the applicable minimum rate. He allegedly charged the shipper the applicable minimum rate with the exception of specific shipments made the subject of the undercharge penalty in the instant case. These undercharges, totaling $530.46 as evidenced by the record, were never disputed by petitioner. Also a fact not disputed by petitioner was his donation to the shipper of his services for about 20 hours each week.[6] His sole income as the Jim Green Trucking Company consists of the difference between the minimum rate paid to him by Lewis Food Company and the amount he was able to negotiate with subhaulers who performed the actual transportation. Petitioner's involved statement in his petition neither adds nor substracts from these basic facts which were not disputed by him. Rather, he disputes what consequences may or should flow from these facts.

Respondent respectfully draws the Court's attention to the fact that the Commission staff counsel's brief appearing at page 10, Appendix C, of Petitioner's Appendix, together with the entire reporter's transcript of the one-day hearing, reproduced as Appendix D beginning at page 20 of petitioner's Appendix, were documents not before the State Supreme Court and therefore should not be considered by this Court.[7] Respondent would also direct the Court's attention to Petitioner's Petition for Writ of Review, made a part of this record, filed with the California Supreme Court

6. Page 110, Pet. App.

7. *Ciucci v. Illinois*, per curiam, 356 U.S. 571 at 573.

wherein petitioner could have but failed to reproduce any portion of said transcript and/or brief. He had every opportunity to do so if he had thought such documents relevant to his appeal in that court. In fact, petitioner failed to reproduce the Commission decision and order under attack in his state court brief or his Petition for Rehearing filed with respondent Commission, both documents essential in this case to his appeal to the California Supreme Court, as they were unavailable to that court in any other manner. As a service to that court and to insure that petitioner would receive a fair hearing in his appeal there, respondent reproduced both documents in its Answer.[8] It should be noted that § 1756 of the California Public Utilities Code[9] expressly provides that the Commission shall certify its record of a case to the California Supreme Court upon the granting by that court of a petition for a writ of certiorari or review, (unlike this Court's Rule No. 21(4)). However, nothing in the Code or in the court's rules on appeal precludes a petitioner from including in the Appendix of his original petition any part of the record made before the California Commission so as to assure its consideration by the California Supreme Court and its inclusion in the record on appeal in the event the petition for writ is denied.

Contrary to fact, petitioner asserts that he raised his federal constitutional objections to the Commission's actions at the earliest possible time therefore preserving them for review.[10] He quotes the Commission decision as proof of this statement.[11] He continues by stating:

> "In that petition (Petition for Rehearing before the Commission appearing in the Commission's Answer,

8. Resp. Answer, App.
9. Page 2, Pet. App.
10. Page 15, Pet.
11. Page 15, Pet., see also p. 14, Pet. App.

in its Appendix at page 15, et seq.) he raised every objection to the opinion and order which he now seeks to assert before this Court." (p. 15, Pet.)

This Court's Rule 23(1)(f) requires that a petitioner must present proof within his petition that his federal question was timely raised, and if he fails to do so, his petition may be denied[12] (Rule 23(4), 28 U.S.C.A. Supreme Court Rules). A study of the record presently before this Court together with Petitioner's petition fails to reveal any support for petitioner's assertion that he raised his federal questions in a timely manner. In his Petition for Rehearing before the Commission, the document that properly should contain such allegations,[13] petitioner claimed generally that

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12. In his brief submitted at the close of the hearing in this proceeding and which is conspicuously omitted in his Appendix while the Commission staff counsel's brief is reproduced, petitioner presented his "constitutional" objections to the Commission in the following manner:

> "To the extent that the proposed action would depend for its support upon the order in Decision No. 61963, it would *plainly be unconstitutional.* Respondent was not a party to the proceedings in which such order was made, and the order did not in terms apply to him; and to the extent that the proposed action would rest solely upon evidence introduced at the hearing of this proceeding, it lacks the support of substantial and legally competent evidence, and would amount to depriving respondent of valuable property and rights, *in violation of the constitutional provisions above cited.* In this connection it may be noted that respondent testified, and the testimony was not disputed, that his trucking business was remunerative (Tr. 94)." (Emphasis added).

This was all petitioner said of his constitutional rights in that brief. The Commission's one sentence in its opinion that "We do not feel that his [petitioner's] constitutional rights are hereby impaired in any way." was in response to this general assertion.

13. PUC § 1732 appearing in Resp. App. at 1.

his *state* constitutional rights had been abridged; i.e., (a) a fair hearing, (b) protection from unreasonable search and seizure, (c) self-incrimination by way of coerced confession, (d) no substantial evidence so substantive due process denied.[14] The specific constitutional grounds urged by petitioner before the California Supreme Court were raised for the first time before that court and therefore not properly before it for review.[15] Petitioner's claim that his Federal Fifth Amendment right against self-incrimination is abridged by the Commission's order is being urged for the first time before this Court.[16]

While the Commission asserts that petitioner's federal constitutional objections herein presented were not timely raised, and therefore should not be considered, thereby requiring a denial of petitioner's Petition for Certiorari without reaching the merits,[17] should this Court consider them, respondent urges they are insufficient for the following reasons.

ARGUMENT

I. Petitioner's Fifth Amendment Right Against Self-Incrimination Not Abridged.

Petitioner bases his claim that his constitutionally protected right against self-incrimination will be violated by the Commission's order on a basic false assumption that any past undercharges discovered by him after a search of his

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14. Comm. Answer, App. p. 15, et seq.

15. Comm. Answer p. 12, et seq., see also *Ferguson v. Georgia*, 365 U.S. 570, 572.

16. The only reference petitioner ever made in his prior pleadings before the Commission and the California Supreme Court was to the California Constitution, Article I, § 13, in connection with the privilege against self-incrimination (see Pet. for Rehearing in Comm. Answer, Appendix 29, and petitioner's Petition for Writ of Review before the California Supreme Court, p. 41).

17. See *New York Central & R. R. Co. v. New York*, 186 U.S. 269, 273; *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67-8.

records *could* be the basis of a criminal prosecution against him even though he is also ordered to collect such undercharges as he may discover.[18] In order to invoke the privilege against self-incrimination, one must be in a position to incriminate himself. Petitioner's authority makes it abundantly clear that the privilege relates to *criminal* prosecutions only. The court pointed out in *Malloy v. Hogan,* 378 U.S. 1 at page 8 (1964):[19]

> "Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion *prove a charge against an accused* out of his own mouth." (Emphasis added)

Respondent does not question that the privilege against self-incrimination is one of the fundamental rights of an accused in a criminal prosecution. The short answer to petitioner's objection here is that all the Commission has ordered him to do is to remove himself from any possible future charge against him, whatever its nature, in connection with his past performance in relationship to the minimum rate tariff. If a search of his records reveals that he has in fact charged his only shipper less than the minimum rate in any instance not revealed by the Commission staff's perusal of his records, he is to collect the correct amount. Once having done that in obedience to the Commission's order, he could never be charged with any misconduct by the Commission or any other forum in connection with such undercharges.[20] Thus, no injurious disclosure could possibly result from his compliance with the instant order.[21]

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18. Page 15 Pet. App.

19. See also *State v. Rixon* (1930) 231 N.W. 217, 68 A.L.R. 1501, and cases collected in 68 A.L.R. 1503.

20. Public Utilities Code, § 3664 at page 4, Pet. App.

21. *Hoffman v. U. S.,* 341 U.S. 479 at 487.

To translate this simple directive into a violation of his federally protected privilege against self-incrimination, petitioner has distorted the entire extent and purpose of the Commission's order. As an established and well-tried policy in protecting the structure of its minimum rate regulations, the Commission has made such orders repeatedly.[22] Hence, shippers who may have obtained transportation of their property at less than minimum rates in past transactions with permitted carriers are required to ultimately pay the lawful rate through this procedure thereby giving effect to the intent of this highly remedial statute. If such an order is not obeyed by a carrier, the Commission may subject it to punishment by contempt.[23] In no way can such an order itself be classified as punishment as the permit carrier is ordered to obtain a benefit; i.e., additional money from the shipper. The California legislature recognized the basic characteristic of such a procedure and in 1963 amended the Public Utilities Code § 3800[24] to permit the Commission to levy a fine equal to the amount of undercharges it (the Commission) had proved at hearing, so that a carrier found to have charged less than the lawful rate by the Commission would not be unjustly enriched by the collection of such past undercharges and could be punished for infractions of the Code. By the very wording of this 1963 amendment, petitioner could not be fined for any undercharges he might discover after a search of his records as the fine is allowed only after the Commission, "after a hearing", finds such undercharges.[25]

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22. Page 16, Respondent's Answer in California Supreme Court wherein statistics as to Commission's enforcement program in fiscal year 1962-63 listed $126,740.11 collected as undercharges through 410 informal proceedings.

23. *Coast Trucking,* (1964) 61 Calif. PUC 778.

24. Reproduced at page 6 in Pet. App.

25. PUC § 3800 at p. 6, Pet. App.

A search of the Public Utilities Code sections reveals no provision wherein petitioner could be punished in any manner for discovering and collecting past undercharges. Neither does petitioner cite any. Section 3801 of California's Public Utilities Code, not reproduced by petitioner, is the only section which might have any relevance.[26] It provides for a fine or jail sentence if a permit carrier (1) violates any provision of Chapter 2 of the Code, or (2) aids or abets another to do so, or (3) who fails to comply with any Commission order. Such unlawful conduct is classified as a misdemeanor; hence, it requires a criminal prosecution and California's one year statute of limitations applies.[27] No such prosecution could take place against petitioner as a result of obeying the Commission's order in the instant case as he would have expressly obeyed all provisions of Chapter 2 of the Code, however belatedly. In passing it should be noted that even were this not so, the one-year statute of limitations has long run against any undercharges petitioner might discover for the years prior to the commencement of this proceeding.

Nowhere in his petition does petitioner cite any authority to support his allegation at page 21 of his petition that to obey the Commission's order he would possibly be furnishing evidence to convict himself of a misdemeanor some time in the future. His entire argument on this issue flows from an unsupported assumption that to discover and disclose past undercharges he would be admitting infractions of the law which are criminally punishable.[28] No Commission proceeding is a criminal proceeding. It is beyond question that it is within the competence of the legislature to confer upon

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26. Page 2, Resp. App.
27. Penal Code § 801.
28. Page 19, Pet. Pet.

respondent Commission functions of a judicial nature which include the imposition of a monetary penalty,[29] but this does not transform Commission proceedings into criminal actions. California's Supreme Court has so held in *William E. Stringfellow v. Public Utilities Commission.*[30] In that case, petitioner, also a permit carrier, subjected to the same kind of Comimssion investigation directed against petitioner here, urged that he had a right to a jury trial on the theory that the Commission procedure was criminal in nature. The California Supreme Court's denial of a writ is equal to a decision on the merits.[31] This holding is in accord with authority in other jurisdictions.[32]

As petitioner cannot subject himself to criminal prosecution through obeying the Commission's order in this case, and as petitioner's own authority makes it clear that the privilege against self-incrimination relates only to possible criminal proceedings which might result against one asserting the privilege,[33] his claim that the instant order violates his Fifth Amendment right against self-incrimination must fall.

II. Petitioner's Fourteenth Amendment Guarantees of Due Process and Equal Protection Not Abridged.

Petitioner centers his claim of denial of due process and equal protection around respondent Commission's ordering paragraph #7[34] which limited his permits to require that

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29. *Helvering v. Mitchell* (1938) 303 U.S. 391.

30. 62 Cal. P.U.C. 595, S.F. No. 21738, writ denied November 4, 1964.

31. *People v. Western Air Lines, Inc.* (1954) 42 C.2d 621 at 630, app. denied 348 U.S. 859.

32. *Wycoff Co. v. Pub. Serv. Comm.* (1962) 13 Utah 2d 123, 369 P. 2d 283, 43 PUR 3d 288.

33. *Malloy v. Hogan,* 378 U.S. 1 (1964); *Communist Party v. Subversive Activities Control Board,* 367 U.S. 1 (1961).

34. Page 12, Pet. App.

he pay carriers no less than the applicable minimum rates established by the Commission when he engages such carriers "in connection with the transportation of property for Lewis Food Company or its customers or suppliers." The Commission, in so limiting petitioner's permits, was acting under the authority of the California Public Utilities Code, section 3572, which provides in part that:

> "The Commission may attach to the permit such terms and conditions as, in its judgment, are required to assure protection to persons utilizing the operations."

The class of individuals who are protected by such a limiting condition are shippers who rely upon the integrity of the Commission's Minimum Rate structure established under the authority of section 3662 of the Code.[35] Even without such restriction, so long as petitioner's relationship with Lewis Food remains the same, as disclosed at the hearing in this proceeding, he would be under such a duty. The limitation in his permit is in reality only a memorandum to put petitioner on continual notice that his voluntary services to his shipper equal a "device" prohibited by section 3668 of the California Public Utilities Code.

It is generally conceded that the nature of the operating authority granted petitioner by this Commission is a privilege, not a right, and as such may be limited or revoked within the limits of due process.[36] Under the authority of

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35. See Resp. App. pp. 1, 2.

36. *Sale v. Railroad*, 15 Cal. 2d 612 (1940).
Not until now has petitioner attempted to claim denial of due process under the federal constitution resulted because of lack of substantial evidence before the Commission. While he went to great lengths in his petition before the California Supreme Court to urge that the Commission's order was not based upon substantial evidence, he claimed only that this resulted in the Commission's exceeding its authority under the state statute, (see p. 18 et seq. Pet. for Writ in State court). His alleged federal due process argument

Section 3774,[37] the Commission could have revoked petitioner's permits rather than fining him $1,000, upon a finding that he had violated provisions of the Code.[38] The general purpose of this section is to endow the Commission with sufficient power to enforce the various provisions of the Code.[39]

Petitioner's constitutional argument that he was denied equal protection of the law is based on an assertion that the effect of the Commission's order conditioning his permits is to treat him differently than others "similarly situated."[40] This argument fails as there are apparently no other carriers "similarly situated". No other carriers are offering this shipper 50 percent of their services gratis. If other carriers "similarly situated" did exist, they obviously would be subject to the same restrictions as petitioner. In short, the basis of the classification petitioner complains of is the relationship of the carrier to his only shipper. This cannot be called an unreasonable or arbitrary basis considering all of the evidence.[41] (Cf. *Morey v. Doud*, 354 U.S. 457 (1957).

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below was restricted to an allegation that the Commission was applying section 3800 retroactively by ordering him to discover and collect past undercharges, an argument he has abandoned before this Court.

37. Appearing at p. 5 of Pet. App.

38. See Commission's Order in Appendix in Respondent's *Answer* before California Supreme Court at page 13, where one commissioner, dissenting, urged that petitioner's permits ought to have been revoked rather than a fine imposed.

39. *Cornall v. Reilly*, 127 Cal. App. 2d 178, 272 P. 2d 572 (1954).

40. Page 29, Pet.

41. In enforcing Section 3668 of the Public Utilities Code, the Commission has repeatedly struck down any contrivance or device which gives a shipper an unfair economic advantage and in so doing has been upheld; see *J & V Trucking Co.*, 59 Cal. P.U.C. 337; *Direct Delivery System*, 54 Cal. P.U.C. 258; *Soule Transportation, Inc.*, 59 Cal. P.U.C. 260, Pet. for Rev. denied S.F. No. 21024;

III. Under 28 U.S. Code Section 1651(a), This Court Has No Jurisdiction to Issue a Common Law Writ of Certiorari to the California Public Utilities Commission Directing It to Certify to This Court That Portion of the Record of This Case Not Certified to the California Supreme Court by Said Commission When That State Court Denied Petitioner's Writ of Review.

Petitioner requests the extraordinary common law writ of certiorari issue from this Court to either California's Supreme Court or to respondent Commission[42] so that the transcript of the hearing in this case, as well as the Commission's staff counsel brief submitted to the examiner who conducted that hearing, should be certified to this Court as part of the official record before it.[43] Aside from the fact that this Court cannot consider what was not before the California State Supreme Court in reviewing this case,[44] respondent urges that 28 U.S. Code Section 1651(a) does not confer jurisdiction on this Court to grant petitioner's prayer for this extraordinary writ in this instance. While it is conceded that such a writ might issue from this Court against any state supreme court in aid of this Court's appellate jurisdiction should such state court refuse to certify the record before it to this Court in any case brought up for review,[45] in the instant case, the documents sought

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Southern California Lumber Transport, 50 Cal. P.U.C. 826, Pet. for Rev. denied S.F. No. 20076; *R. W. Jones, Jr.*, 60 Cal. P.U.C. 826 Pet. for Rev. denied S.F. No. 21437; *Alhambra Trucking Co.*, 60 Cal. P.U.C. 644, Pet. Rev. denied, S.F. No. 21440, app. dism. 379 U.S. 14 (1964).

42. Pet. p. 2.

43. Both documents reproduced in petitioner's Appendix at pp. 19 and 29.

44. Discussed supra at pp. 4, 7.

45. See *In re Summers*, 325 U.S. 561 (1945). No extraordinary writ was involved there. Petitioner's reliance on this case is misplaced. That case involved a petition for the usual writ of certiorari. There petitioner asked this Court to review the action of the Su-

by petitioner were concededly *never* before the state court but are now and have been in the exclusive custody of respondent.[46]

It is submitted that this Court and all federal courts were granted the power to issue extraordinary writs only in aid of federal jurisdiction already conferred. Hence Section 1651 cannot be read to amount to a new grant of power.[47] No federal court could issue such a writ against a state court except in aid of its federal appellate jurisdiction. In *Middlebrooks v. Thirteenth Judicial Dist. Circuit Court, Union City, El Dorado, Ark.*,[48] where the plaintiff, a federal prisoner, asked for an extraordinary writ to have himself produced in a state court, the court pointed out at page 486 of its per curiam opinion:

> "Federal courts of appeal are authorized to issue . . . extraordinary writs only in aid of their appellate jurisdiction, either existing or potential (28 U.S. Code Section 1651(a)). As to the state charges or proceedings pending against petitioner, there is, of course, no existing appellate jurisdiction in this (federal) court, nor is it potentially possible that any such jurisdiction could come to exist. The actions of the state court are completely outside the field in which we can make judicial review and correction."

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preme Court of Illinois which had denied his prayer for admission to practice law in Illinois. There the record in question had been made in the Supreme Court of Illinois as no orginal forum existed below. The record brought up to this Court was that which was before the Illinois Supreme Court, not some part of a record which that state court did not have and had never considered.

46. Pet. p. 32.

47. *Edgerly v. Kennely*, CA Ill 1954, 215 F. 2d 420, cert denied 348 U.S. 738; *U.S. ex rel State of Wisconsin v. First Federal Savings and Loan Ass'n.*, CA Wis 1957, 248 F. 2d 804, cert denied 355 U.S. 957.

48. (C.A. Ark. 1963) 323 F. 2d 485.

In *In re Previn,*[49] the court construed the code section thusly:

> "The basic purpose of section 1651 and of its statutory predecessors, was to assure to the various federal courts, the power to issue appropriate writs and orders of an auxiliary nature in aid of their respective jurisdictions as conferred by other provisions of law."

This Court has clearly and repeatedly emphasized that such extraordinary writs are proper only to correct jurisdictional error on the part of a lower court[50] and are only to be used when, for some special reason, remedy by appeal does not provide an adequate remedy.[51] This Court has held that such writs cannot be used to obtain review of military tribunals[52] nor to review orders made by executive officers of the federal government.[53] Neither are such writs available to annul alleged invalid municipal ordinances.[54] When a state court attempted to rely on the extraordinary writ of common law certiorari to compel a federal trial court to certify its records to it, the Federal District Court struck down such an assertion of power in *Superior Court of State of California in and for Los Angeles County v. U. S. Dist. Court, Northern District of California, Southern Division.*[55]

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49. 1 Cir. 204 F. 2d 417 at 418.

50. *United States Alkali Assoc. v. U.S.* (N.Y. 1945), 325 U.S. 196 at 202.

51. *Ex parte Fahey,* 332 U.S. 258; see also cases reviewed in Wolfson, *Extraordinary Writs in the Supreme Court since Ex Parte Peru,* 51 Col. L. Rev. 977 (1951).

52. *Ex parte Vallandigham,* 1864, 1 Wall. 243, 251; *In re Vidal, Porto Rico,* 1900, 179 U.S. 126.

53. *Mickadiet v. Payne* (App. D.C. 1920), 269 F. 194, aff. 258 U.S. 609.

54. *Borden's Condensed Milk Co. v. Baker* (N.J. 1910), 177 F. 906, 101 CCA 186.

55. (C.A. Cal. 1958) 256 F. 2d 844.

At page 847 of its opinion the court explained:

> "The issuance of a writ of certiorari by a federal district court directed to a state court is unprecedented . . . . under the Federal Constitution, its use has been confined exclusively to the United States Supreme Court and directed to the 'inferior courts' of the federal system or to the final appellate tribunals of a state solely when a question under the paramount authority of that instrument was involved. . . . . The federal court cannot command the state court to produce its record. The state court cannot command a federal court to produce its record."

Petitioner here has misconceived this Court's jurisdiction to issue the extraordinary writ of common law certiorari under 28 U.S. Code Section 1651(a) in the instant case. Petitioner is asking this Court to order certification of a record *not* before a final appellate tribunal of a state. The documents in question were not there for two reasons: (1) petitioner did not present them to that state tribunal when he might have done so, as was indicated supra, thus preserving them for review before this Court, and (2), minus petitioner bringing them before that court, a specific state statute only requires their presence before the state court when that court exercises its discretion to grant a Writ of Review.[56]

The statutory scheme for judicial review of respondent Commission's decision by the California Supreme Court has not been brought under federal constitutional attack by petitioner. This was the only avenue available to him to raise the instant issue, not by the prayer for an extraor-

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56. See PUC § 1756. This code section requires the Commission to certify its record to the California Supreme Court *only* in cases where that Court grants a petition for writ of certiorari or review; see Pet. App. p. 2.

dinary writ which if granted by this Court would successfully nullify the effect of such a statutory scheme. Perhaps petitioner did not take this avenue of attack because the precise issue it would raise has been resolved by this Court in favor of the constitutionality of California's statutory scheme for review of respondent Commission's decisions.[57]

Petitioner had the opportunity to have the transcript of this case available to this Court and any other document before respondent by the simple device of reproducing them in his Petition for Review before the California Supreme Court as he has now done in his petition to this Court. It must be assumed that he felt his appeal to the state court was not jeopardized by their absence. He cannot be heard to claim jeopardy on his further appeal to this Court. This Court would be nullifying a state statute if it should grant petitioner's prayer. It does not lie within this Court's jurisdiction to produce such a result through the device of an extraordinary writ issued under 28 U.S. Code Section 1651(a).

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57. *Lehigh Valley R.R. Co. v. Public Utility Commissioners,* 278 U.S. 24 (1928) affirming *Napa Valley Electric Co. v. Railroad Commission of the State of California,* 251 U.S. 366; see also *Alhambra Trucking Co. et al. v. Public Utilities Commission,* pet. for cert. denied 379 U.S. 14 (1964).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this motion for leave to file a petition for a common law writ of certiorari and for a writ of certiorari should be denied.

Respectfully submitted,

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January 4, 1966

(Appendix Follows)

Appendix

Public Utilities Code Section 1732. The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not set forth in the application.

Public Utilities Code Section 3572. Any highway carrier desiring a permit to operate as a highway contract carrier or a radial highway common carrier shall file a petition therefor with the commission. The petition shall set forth:

(a) The name and address of the applicant.

(b) The names and addresses of its officers, if any.

(c) Full information concerning the financial condition and physical properties of the applicant.

(d) Such other information necessary to the enforcement of this chapter as the commission may require.

Before a permit is issued, the commission shall require that the applicant establish financial responsibility. The commission may, with or without hearing, issue or refuse to issue the permit. If the commission finds that the applicant possesses the required financial responsibility to perform the operations proposed, it shall issue a permit. The Commission may attach to the permit such terms and conditions as, in its judgment, are required to assure protection to persons utilizing the operations.

Except as otherwise provided in this chapter, upon compliance by an applicant with this chapter, the commission shall issue a permit.

Public Utilities Code Section 3662. The commission shall, upon complaint or upon its own initiative without complaint, establish or approve just, reasonable, and non-

discriminatory maximum or minimum or maximum and minimum rates to be charged by any highway permit carrier for the transportation of property and for accessorial service performed by it.

In establishing or approving such rates the commission shall give due consideration to the cost of all of the transportation services performed, including length of haul, any additional transportation service performed, or to be performed, to, from, or beyond the regularly established termini of common carriers or of any accessorial service, the value of the commodity transported, and the value of the facility reasonably necessary to perform the transportation service.

Public Utilities Code Section 3801. Every highway permit carrier and every officer, director, agent, or employee of any highway permit carrier who violates or who fails to comply with, or who procures, aids, or abets any violation by any highway permit carrier of any provision of this chapter, or who fails to obey, observe, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the commission, or of any operating permit issued to any highway permit carrier, or who procures, aids, or abets any highway permit carrier in its failure to obey, observe, or comply with any such order, decision, rule, regulation, direction, demand, requirement, or operating permit, is guilty of a misdemeanor, and is punishable by fine of not more than five hundred dollars ($500) or by imprisonment in the county jail for not more than three months, or both.